IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Appeal No.896/2003

1. Sukhram S/o Budhram Yadav AND
2. Rakesh S/o Shri Mahendra Singh Jat
Versus
State of Rajasthan through P.P.

Date of Judgment :::: 29th May, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Biri Singh Sinsinwar with
Shri Harendra Singh Sinsinwar and
Shri Kamlendra Sihag and
Shri Kartar Singh Faujdar, Counsel for accused-appellants
Smt. Nirmala Sharma, P.P., for the State

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//Reportable//

By the Court:-

This appeal under Section 374, Code of Criminal Procedure, on behalf of two accused-appellants, namely, (1) Sukhram S/o Budhram Yadav and (2) Rakesh S/o Shri Mahendra Singh Jat, is directed against the impugned judgment and order dated 4.6.2003 passed by the Additional Sessions Judge (Fast Track), Kishangarhbas, District Alwar, in Sessions Case No.67/02 (17/02), whereby each appellants were convicted and sentenced under Section 397, Indian Penal Code, to undergo 7 years rigorous imprisonment, and a fine of Rs.5,00/-; in default of payment of fine, to further undergo six months' additional simple

imprisonment.

Briefly stated the facts of the case are that on 7.1.2002 at about 8.00 PM a written-report (Exhibit P-1) was lodged by PW-1 Raju S/o Pratap Singh, at Police Station Kotkasim, Alwar, wherein it was alleged that he is resident of village Shahjahapur and working as driver on Indica Car No.RJ 02 T 0120 of Santra Devi W/o Balwant Singh. On 7.1.2002 at about 5.15 PM two persons came to him and asked the hiring-charges of Indica Car for Badhana, Police Station Kotkasim and it was settled at Rs.450/- for the said destination. He took both of them in the Car. At village Bawal, these persons purchased bananas and liquor; thereafter he departed with them, taking the Car for Badhana. On arrival at village Badhana, he told them about it. Thereupon, they said that their relatives reside nearby 'dhani' and requested to go ahead. Soon he left Badhana for 'dhani', all of a sudden, one person sitting behind him, put a shawl at his neck and pulled him backside forcibly; he stopped the vehicle; the another person descended from the Car and tried to pull him out therefrom; thereupon started a scuffle between us. It was further alleged in the report that the descended person, lashed with knife, intended to inflict him an injury then he caught hold of his knife and thereby he sustained injury on his right-hand-finger and both of them started scuffling and pushed

Raju down the earth. Thereafter both of them started his car and fled towards Kotkasim. He shouted loudly and number of persons gathered at the spot. One driving licence was found belonging to one person Sukhram whose photo was also affixed thereon. The another person was Rakesh Jat. On the basis of this written-report, the police registered FIR No.6/2002 under Section 394 of the Indian Penal Code.

During investigation, the accused-persons were arrested. The vehicle was seized. After completion of investigation, a charge-sheet was filed against both the appellants. The trial court framed charge against both the appellants under Section 397, Indian Penal Code, which was denied and the trial was claimed.

The prosecution, in support of the charge, examined PW-1 to PW-13 and produced documentary evidence Exhibit P-1 to Exhibit P-19.. Thereafter the statements of accused-persons were recorded under Section 313 of the Code of Criminal Procedure, wherein it was stated that they were coming from Bawal to Lalpur and one Indica Car came and the Driver thereof asked them as to where they are going and he caused them to be seated in the vehicle. On the way, driver Raju caused them to have liquor. On having found surrounded on all sides by the Police, Driver Raju fled leaving the vehicle at check-post of Daruheda and

the Police arrested them. Thereafter they came to know that a false report has been lodged against them.

The trial court, after considering the evidence on the record as well as the submissions of both the parties, convicted and sentenced the accused-appellants, as mentioned above.

The learned counsel for the appellants contended that as per the written-report, the incident took place at about 8.00 PM on 7.1.2002 and immediately thereafter a message was given at Police Station Daruheda and the vehicle was seized along with the accused-persons on 7.1.2002 itself. But seizure memo of the vehicle as well as other articles show that the same were seized on 8.1.2002 and accused-persons were also arrested on 8.1.2002 at 6.00 PM, whereas the officials of Police Station Daruheda, in their statements, stated before the trial court that on 7.1.2002 itself the vehicle was seized and accused-persons were taken into custody. The statement PW-1 Raju was also referred, who admitted that on the same day he went at Daruheda in Police Jeep and saw the accused as well as the vehicle there on that day itself. The learned counsel referred the relevant Exhibits, exhibited on behalf of the prosecution, and contended that there are two sets of evidence in the present case; one set shows that Daruheda police

seized the vehicle on 7.1.2002 arresting the accused-persons, whereas another set of evidence shows that on 8.1.2002 at about 6.00 PM both the accused-persons were arrested by Kotkasim Police at Kharkhada Mod near Daruheda Police Station and the vehicle was seized. The learned counsel also referred Exhibit P-6, the medical-report of injured Raju (PW-1) and contended that there is overwriting in the date as well as time. Initially the date 8.1.2002 and time 1.30 AM were written but later on changed to 7.1.2002 and 8.30 PM. He, therefore, contended that one set of prosecution evidence controverts the another set and there is no consistent evidence to prove the charge against the accused-appellants and they are entitled to get the benefit of doubt. The trial court has committed an error in convicting the accused-appellants in absence of reliable and trustworthy evidence in the case. In support of his contentions, the learned counsel for the appellants referred to the decision in the case of **Harchand Singh & Another v. State of Haryana - AIR 1974 SC 344**.

The learned counsel for the appellants further contended that prima-facie the offence under Section 397, IPC, is not made out. He contended that accused-appellants were arrested on 8.1.2002 at 6.00 PM and information under Section 27 of the Evidence Act was given by accused Sukhram at 6.20 PM and thereafter

recovery of so-called knife was made at the instance of accused Sukhram whereas from the prosecution evidence itself it is clear that on 7.1.2002 itself the recovery of so-called knife was made by officials of Daruheda Police Station itself. He further contended that in the information-memo (Exhibit P-10), recorded under section 27 of the Evidence Act, it is not mentioned that he has given the information in respect of knife, which was used for so-called robbery and, in absence of such facts of using of weapon in crime in the information given under Section 27 of the Evidence Act, the same cannot be connected with the crime and the recovery of knife, made in pursuance of such information, is inadmissible in evidence. He further contended that in Exhibit P-11 it is specifically mentioned that no bloodstain was found on the knife. One 'motbir' of Exhibit P-11, namely, Ramswaroop was not examined. Another 'motbir' Tejsingh (PW-9) has not stated that recovery of knife was made in pursuance of the information given under Section 27 of the Evidence Act, but it was found during search of vehicle itself at the time of seizure of the vehicle.

The learned counsel for the appellant alternatively contended that, although the recovery of knife itself is doubtful and evidence in this regard is inadmissible in evidence, the so-called knife cannot be said to be a deadly weapon in the facts and

circumstances of the present case. He also submitted that knife was not used as a weapon to commit robbery but it was only used in scuffle with Raju (PW-1), when he was not allowing the accused-persons to take the vehicle with them.

It is further contended that the prosecution had not produced the knife nor got it identified from the complainant PW-1 Raju in the court and further that, according to the statement of PW-3 Dr. Padam Chand Jain, the injuries were caused by light sharp weapon, therefore, it was a light sharp weapon, which cannot be described as deadly weapon and, in these circumstances, the offence under Section 397, IPC, is not made out, and, at the most, the appellant could have been convicted by the trial court for the offence under Section 394, IPC.

The learned Public Prosecutor defended the judgment of the trial court and contended that there is no merit in any of the contentions of the learned counsel for the appellants and the appeal is liable to be dismissed.

I have considered the submissions of the learned counsel for both the parties and minutely scanned the impugned judgment as well as the record of the trial court.

Before examining the evidence of the present

case in the light of submissions of learned counsel for the appellants, it will be relevant to refer and quote the relevant Sections as well as the case law cited at the Bar.

Section 394 and 397 of the IPC are reproduced as under:-

> "**394. Voluntarily causing hurt in committing robbery**.- If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."
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> "**397. Robbery, or dacoity, with attempt to cause death or grievous hurt**. - If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt, to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."

In **Harchand Singh & Another Vs. State of Haryana – AIR 1974 SC 344**, the Hon'ble Apex Court held that in a case where the prosecution leads two sets of evidence, each one of which contradicts the other, it is difficult to found the conviction of the accused.

In **Balik Ram Vs. The State – 1983 Cri.L.J. 1438**, the Delhi High Court considered whether knife is a deadly weapon or not, and held that knives are

weapons available in various sizes and may just cause little hurt or may be the deadliest. They are not deadly weapons per se such as would ordinarily result in death by their use. What would make a knife deadly is its design or the manner of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved and prosecution should prove that the knife used by the accused was a deadly one. In Para 5 of the judgment, it was further held as under:-

> "5. .....But was the knife so used was a deadly weapon within the meaning of S.397 IPC? What is a deadly weapon is not defined in the Code. It must, I think, therefore, be a weapon which is used was likely to cause death. In Lakshmiammal v. Saniappa Gounder, AIR 1968 Mad 310 : (1968 Cri LJ 1084), weapons like knife, hammer, crowbar and spades were held undoubtedly to be deadly weapons, but in Mir Bayyan Khan v. Emperor, AIR 1935 Pesh 65 (2) : (36 Cri LJ 933), it was said that a crow-bar or spade may well be a deadly weapon it used as a weapon of offence, but not it used for destroying a bridge (that is I think, for peaceful purposes). Knives are weapons available in various sizes and may just cause little hurt or may be the deadliest. They are not deadly weapons per se such as would ordinarily result in death by their use. What would make a knife deadly is its design or the manner or its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved and prosecution should prove that the knife used by the accused was a deadly one. Though the knife that was recovered from the accused a few hours of the occurrence, was no doubt a deadly one on account of its size and design but it was

> not shown to the victim when he came to depose nor has he given any description of the knife so that it could be held that the knife alleged to have been placed by the accused on his abdomen was the one recovered or the one similar to that one. The accused can, therefore, legitimately claim that the weapon used by him has not been proved to be a deadly one. And if there is want of proper proof, the benefit should go to the accused and the prosecution cannot invoke S.397, IPC to fix him up in the minimum sentence of seven years. ....."

In Jagdish and etc. v. The State - 1985 Cri.L.J. 1621, the Delhi High Court considered whether knives could be termed "deadly weapons" as envisaged under S.397, IPC, and held as under:-

> "8. Lastly, the question would arise as to whether the appellants are liable to enhance punishment under S.397, I.P.C. Needless to say that the said section does not create any substantive offence and it simply prescribes a minimum sentence for the offence of robbery under the aggravating circumstances mentioned therein. While there can be no shadow of doubt that both the appellants carried knives and they aimed the same at their victims, namely, Rajinder Prashad and Krishan Kumar, there is no satisfactory evidence to establish that those knives could be termed "deadly weapons" as envisaged under S.397. Rajinder Prashad and Krishan Kumar have simply stated that both the appellants were carrying a knife each in their hands. However, according to Raj Kishore the knives carried by them were small. In the FIR the knives were described as vegetable cutting knives. The question would, therefore, arise whether in the absence of anything more the said knives can be said to be deadly weapons.
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> 9. A deadly weapon is a thing designed to cause death, for instance, a gun, a bomb, a rifle, a sword or even a knife. A thing not so designed may also be used as a weapon to cause

> bodily injury and even death. It will be a question of fact in each case whether the particular weapon which may even be a knife can be said to be a deadly weapon. In the instant case, there is evidence to the effect that the knives which the accused were having were small in size. They were ordinary vegetable cutting knives. This renders the possibility of those knives being deadly weapons highly doubtful and as such the appellants shall be entitled to benefit thereof. Consequently it would be unfair to impose the minimum sentence contemplated in S.397 on the appellants merely because they used those knives in the commission of the crime. However the case of Harun stands on a different footing inasmuch he even fired a shot from his country-made pistol. This fact is amply borne out by the recovery of pellets and wads from the venue of occurrence."

In Mohd. Aman and Another v. State of Rajasthan - (1997) 10 SCC 44, the Hon'ble Apex Court considered the effect of non-production of link evidence in the case and set-aside the conviction of the accused while holding as under -

> "....In other words, unless the prosecution conclusively establishes that the articles recovered were stolen when the murder was committed, and not on an earlier occasion, there would be a missing link in the chain so far as the specific accusation levelled against the accused is concerned. Once it is found that the evidence relating to find of footprints and fingerprints of the appellant and the recovery of the four silver rings cannot be safely relied upon, the proof of the other two circumstances, namely that a bloodstained knife was recovered after fifteen days of the incident pursuant to the statement of the accused and that few simple injuries were found on his person on 20.4.1983 when he was arrested would only raise a strong suspicion against him and not a conclusive inference of his guilt. ....."

Section 397, IPC, makes it clear that if, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years, therefore, a minimum sentence of 7 years is prescribed under Section 397, IPC, hence the prosecution evidence is to be examined with great care and caution.

Under Section 397, IPC, the words "offender uses" show that it is an individual act of an accused which is relevant to attract the provisions of Section 397, IPC, and in these circumstances the principle of constructive or vicarious liability en-grafted in Section 34, IPC, is not at all applicable or attracted.

From the prosecution evidence in the present case, it appears that on 7th January, 2002 the appellants hired Indica Car of the complainant for going to Badhana, Police Station Kotkasim, and when complainant Raju reached at Badhana and told the accused that Badhana has come, still they did not alight from the vehicle and told him to go ahead on the pretext that their relatives are residing in 'dhani' and when vehicle went ahead then soon thereafter one accused put his shawl on the neck of

PW-1 Raju and pulled back forcibly and soon thereafter Raju stopped the vehicle. The another person came out of vehicle and tried to pulled Raju out of vehicle and on this a scuffle took place and Raju fell down. Thereafter, both the accused-appellants fled with the vehicle and soon thereafter report was lodged. It appears that a message was given by the officials of Police Station Kotkasim to Daruheda Police Station and the police officials of Daruheda got success and caught hold the accused-persons and vehicle at the check-post and called the police of Kotkasim at Daruheda.

No doubt, there are some contradictions in the prosecution evidence about recovery of vehicle and arrest of accused-persons, but it appears that report had already been registered at Police Station Kotkasim, therefore, another/fresh report could not have been registered at the Police Station Daruheda by Daruheda Police when they caught hold the vehicle with accused as per message received by them from Kotkasim police and as and when police officials of Police Station Kotkasim reached, the vehicle as well as the accused-persons were handed over to them and, in these circumstances, there are some contradictions in the statements of police officials of Daruheda and police officials of Kotkasim, which are not material and fatal to the prosecution case. It is proved beyond

doubt that the Taxi of PW-1 Raju was hired by accused-persons and they pulled Raju out of the Taxi and fled with Taxi. In these circumstances, on the basis of evidence available in the present case, I am not impressed with the first submission of the learned counsel for the appellants that there are two sets of evidence, which are contrary to each other and charge is not proved beyond all reasonable doubts and accused-appellants are entitled to be acquitted of the charge on this ground alone.

Now, I come to another submission of the learned counsel for the appellants whether evidence relating to recovery of knife used in the present incident by the accused-persons, was admissible in evidence or not, and further the said knife can be described as deadly weapon in the facts and circumstances of the present case.

The accused-persons were arrested on 8th January, 2002 at 6.00 PM vide Exhibit P-7 - the arrest-memo of Sukhram, and Exhibit P-8 - the arrest-memo of Rakesh. The information of accused Sukhram, alleged to have been given under Section 27 of the Evidence Act, was recorded on 8th January, 2002 vide Exhibit P-10 at 6.20 PM and, in pursuance thereof, the knife was recovered vide seizure-memo Exhibit P-11 at 6.25 PM. There are two witnesses - Ramswaroop and Tejsingh to seizure-memo Exhibit P-11. Ramswaroop was not examined by the

prosecution. Tejsingh was examined as PW-9, who stated that he along with SHO Amarsingh went at Daruheda and they found that Indica Car was there with two persons. They opened the window of the vehicle and, on its search, one knife was recovered. PW-9 Tejsingh does not say that any information under Section 27 of the Evidence Act was given by accused Sukhram and, in pursuance thereto, the knife was recovered. The information Exhibit P-10 under Section 27 of the Evidence Act further shows that it has no mention of his giving the information regarding recovery of knife which was used in the offence. There is no reference of any incident including the said incident relating to PW-1 Raju in this information. Exhibit P-11 the seizure-memo further shows that there was no bloodstain on the knife. The accused Sukhram was arrested at 6.00 PM and he gave the information at 6.20 PM and knife was recovered at 6.25 PM vide Exhibit P-11 and no human bloodstain was found on it.

PW-8 Sanjay, constable at Police Station Daruheda, was also examined by the prosecution, who stated that when they received V.T.I. (message from Police Station, Kotkasim) about robbery, by accused-persons, of Indica Car, he went with Ramswaroop, S.H.O., and stopped the vehicle at Nikhri-Dungarwas T-point and took both the accused-persons in their custody and also recovered one knife from Sukhram.

Thereafter S.H.O., Kotkasim came and arrested the accused-persons. PW-8 is the prosecution witness and has not been declared hostile and his statement is binding on the prosecution. From his statement, it clearly reveals that knife was recovered from the custody of Sukhram when he was not being arrested by police officials of Police Station, Kotkasim. The statement of PW-8 is contrary to the statement of PW-4 Amar Singh, the Investigating Officer, who stated about giving of information by accused Sukhram under Section 27 of the Evidence Act, and recovery of knife in pursuance of said information, vide Exhibit P-11 by him.

Apart from above, it is also relevant to mention that knife was not used by accused when they were sitting in the vehicle as at the point of knife the vehicle was not made to be stopped but they put a shawl on the neck of PW-1 Raju, the driver, and pulled it back forcibly and soon thereafter Raju stopped the vehicle. It shows that there was no knife with them and so-called recovery of knife vide Exhibit P-11 is bogus one. The prosecution has placed on the record a copy of the injury-report (Exhibit P-6) of injured Raju and has examined PW-3 Dr. Padam Chand Jain.

In this connection, it is relevant to mention that as per the injury-report (Exhibit P-6) two simple

injuries were found on the person of Raju; one by sharp-edged-weapon and another by blunt object. None of the injury has been described as grievous. It further reveals that initially the date 8.1.2002 was mentioned on it but there is cutting as well as overwriting and the date 8th was changed to 7th and after cutting 8.1.2002, the date 7.1.2002 was mentioned. The time was initially mentioned as 1.30 AM, but it was changed to 8.30 PM. In these circumstances, Exhibit P-6 cannot be used as corroborative evidence in any manner whatsoever, rather it creates doubt on the prosecution evidence relating to recovery of knife as per information of accused.

It is also relevant to mention that knife, which was seized vide Exhibit P-11, was not produced in the court as admitted by PW-1 Raju and same was not got identified from him during trial of the case. PW-1 has not given any description of knife, which was used at him during the occurrence. The knife, used in the incident is a deadly weapon or not, can be decided on the basis of evidence available in a particular case. In the present case, PW-3 Dr. Padam Chand Jain has stated that the injuries sustained by the injured could be inflicted by light sharp weapon, meaning thereby he admitted that the weapon, used for inflicting injury on the person of Raju, was light

sharp weapon, therefore, from the prosecution evidence itself, it cannot be said to be a deadly weapon in the facts and circumstances of the present case.

In view of the above discussion and reasons, it is clear that prosecution evidence relating to recovery of knife is not cogent and legal, more-so it is also not clear beyond reasonable doubt that the said knife was a "deadly weapon" in the facts and circumstances of the present case. In these circumstances, in case the recovery of knife is ousted from the prosecution evidence then it is not proved that accused-appellants used any deadly weapon in the present incident so as to attract the provisions of Section 397, IPC.

In view of the above, I find that the learned trial court, without considering the above facts, evidence and circumstances of the case, wrongly convicted and sentenced the accused-appellants for the offence under Section 397, I.P.C. and proper Section for their conviction is 394 I.P.C.

So far as the sentence of imprisonment to be awarded under Section 394, IPC, is concerned, I find that the appellants have already remained in jail for about four years and two months, and ends of justice will meet in case they are sentenced to undergo 4 years and 2 months imprisonment, already undergone by

them.

Consequently, the appeal of the appellants is partly allowed. Their conviction and sentence under Section 397, IPC, is set-aside and they are convicted under Section 394, IPC, and sentenced to a period of 4 years and 2 months rigorous imprisonment already undergone by them.

Both the appellants are in judicial custody, therefore, it is directed that they be set at liberty forthwith, if their custody is not required in any other case.

(Narendra Kumar Jain) J.

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